APPELLANT PRO SE:

**REX A. ASCHLIMAN**
Bunker Hill, Indiana

ATTORNEYS FOR APPELLEE:

**STEVE CARTER**
Attorney General of Indiana

**MATTHEW D. FISHER**
Deputy Attorney General
Indianapolis, Indiana

# IN THE COURT OF APPEALS OF INDIANA

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| REX A. ASCHLIMAN, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 01A05-0605-PC-269 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE ADAMS CIRCUIT COURT
The Honorable James A. Heimann, Judge
Cause No. 01D01-0411-PC-2

**April 26, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**MAY, Judge**

Rex Aschliman, *pro se*, appeals the denial of his petition for post-conviction relief. We affirm.

## FACTS AND PROCEDURAL HISTORY

In 1993, Aschliman was convicted of burglary and found to be an habitual offender. In 1994, his conviction was affirmed on direct appeal but his case was remanded for resentencing. In 2004, Aschliman filed a petition for post-conviction relief ("PCR").

In his PCR petition, Aschliman asserted five grounds for relief: 1) denial of his right to retain counsel of his choice; 2) denial of a fair trial because the trial judge refused to recuse himself; 3) prosecutorial misconduct; 4) ineffective assistance of trial counsel; and 5) ineffective assistance of appellate counsel. In 2006, the post-conviction court denied his PCR petition after a hearing. The post-conviction court found the first three issues were waived because Aschliman had not raised them on direct appeal. The post-conviction court determined Aschliman did not prove counsel's representation at trial or on appeal fell below an objective standard of reasonableness.

## DISCUSSION AND DECISION

Aschliman argues the post-conviction court erred by taking judicial notice of the record, by determining trial counsel was not ineffective, and by determining appellate counsel was not ineffective.

1. Standard of Review

Post-conviction proceedings are not "super appeals" through which convicted persons can raise issues they failed to raise at trial or on direct appeal. *McCary v. State*,

761 N.E.2d 389, 391 (Ind. 2002), *reh'g denied*. Rather, post-conviction proceedings afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. *Davidson v. State*, 763 N.E.2d 441, 443 (Ind. 2002), *reh'g denied, cert. denied* 537 U.S. 1122 (2003); *see also* Ind. Post-Conviction Rule 1(1)(a). Post-conviction proceedings are civil in nature, and petitioners bear the burden of proving their grounds for relief by a preponderance of the evidence. P-C.R. 1(5).

When a petitioner appeals the denial of post-conviction relief, he appeals from a negative judgment. *Curry v. State*, 674 N.E.2d 160, 161 (Ind. 1996). Consequently, we may not reverse the post-conviction court's judgment unless the petitioner demonstrates the evidence "as a whole, leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court." *Id.*

The post-conviction court is required to make specific findings of fact and conclusions of law on all issues presented. P-C.R. 1(6). We accept the post-conviction court's findings of fact unless they are clearly erroneous, but we do not give deference to the post-conviction court's conclusions of law. *Davidson*, 763 N.E.2d at 443-44. On appeal, we examine only the probative evidence and reasonable inferences that support the post-conviction court's determination. *Conner v. State*, 711 N.E.2d 1238, 1245 (Ind. 1999), *cert. denied* 531 U.S. 829 (2000). We do not reweigh the evidence or judge the credibility of the witnesses. *Id.*

2. Judicial Notice of Record

The post-conviction court may not take judicial notice of the transcript of prior proceedings absent exceptional circumstances. *Bahm v. State*, 789 N.E.2d 50, 58 (Ind.

Ct. App. 2003), *clarified on reh'g by* 794 N.E.2d 444 (Ind. Ct. App. 2003), *trans. denied* 804 N.E.2d 751 (Ind. 2003). Rather the transcripts must be introduced just like any other exhibit. *Id.*

After filing his PCR petition, Aschliman requested this Court transmit the record on appeal to the post-conviction court so that the record could be introduced as an exhibit in the PCR proceedings. We denied Aschliman's request but noted we would "honor a similar request from the trial judge." (App. at 23.) Aschliman then filed a motion with the post-conviction court and asked it to request the record on appeal from this Court "for use as an exhibit in post conviction proceedings." (*Id.* at 21.) When the post-conviction court failed to rule on his motion within thirty days, Aschliman filed a second motion. The post-conviction court had not ruled on either motion by the time of the hearing.[1]

At the beginning of the PCR hearing, the State requested the post-conviction court "take judicial notice of the record of proceedings, including the evidence and everything that was also presented in original trial." (Tr. at 2.) Aschliman referred the court to his motions concerning the record. The post-conviction court noted a copy of the transcript had been given to Aschliman when he was being transported to the hearing. Aschliman stated he had "that transcript, but what I was trying to get is the complete record here today so we could use it as evidence because the Supreme Court [sic] says it has to be at the hearing." (*Id.* at 3.) The post-conviction court declined Aschliman's offer of

[1] The record does not indicate the reason the post-conviction court did not rule on Aschliman's motions.

supporting case law because Aschliman had cited the case in the previous motion and the court had "read that motion." (*Id.* at 4.)

The post-conviction court does not appear to have ruled on Aschliman's motions. Nor is it clear the post-conviction court took judicial notice of the trial proceedings.[2] Aschliman asserts: "Although the record is not clear as to whether the post-conviction court took judicial notice of the record, if so, it was improper on the courts [sic] part and prejudiced Aschliman." (Br. of Appellant at 6.)

Aschliman correctly notes the post-conviction court could not take judicial notice of the record. Assuming *arguendo* the post-conviction court took judicial notice of the record, however, Aschliman has not explained how he was prejudiced by this error. Consequently, we conclude Aschliman has waived this issue for appellate review. *See Hollowell v. State*, 707 N.E.2d 1014, 1025 (Ind. Ct. App. 1999) (failure to present cogent argument constitutes waiver of issue for appellate review).

3. Assistance of Trial Counsel

To establish a violation of the Sixth Amendment right to assistance of trial counsel, a defendant must establish the two components set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), *reh'g denied* 467 U.S. 1267 (1984). *Wesley v. State*, 788 N.E.2d 1247, 1252 (Ind. 2003), *reh'g denied*. The defendant must show both that defense counsel's performance was deficient and that the deficient performance prejudiced the defense. *Id.*

[2] The post-conviction court did not explicitly state it would take judicial notice of the trial proceedings. The only document cited in the court's order denying Aschliman's PCR petition is State's Exhibit 1, a copy of the brief appellate counsel submitted to this Court in Aschliman's direct appeal.

Aschliman lists three[3] errors under the rubric of ineffective assistance of trial counsel. He argues trial counsel failed to object to the admission of certain evidence on chain of custody grounds; "trial counsel erred by permitting trial court to become a self-proclaimed expert without objection," (Br. of Appellant at 10); and trial counsel failed to object to a transcript used at trial being prepared by someone "other than the official court reporter." (*Id.* at 11.) However, Aschliman does not explain how these alleged errors by trial counsel, individually or collectively, prejudiced his defense. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Strickland*, 466 U.S. at 697. Consequently, Aschliman's claim of ineffective assistance of trial counsel must fail.[4]

4. Assistance of Appellate Counsel

A claim of ineffective assistance of appellate counsel incorporates the *Strickland* standard, requiring a defendant to show both deficient performance and prejudice.

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[3] Aschliman argues "[t]rial counsel denied Aschliman his Sixth Amendment right to counsel of his own choice and effective assistance by failing to withdraw and/or object to trial court placing lien on Aschliman's real estate and forcing court appointed counsel." (Br. of Appellant at 7.) However, his PCR petition does not include failure to object to the lien as a ground for ineffective assistance of counsel. This issue is waived because it was not asserted in Aschliman's PCR petition.

The PCR petition does include a challenge to the lien on the ground it denied Aschliman his right to counsel of choice, and Aschliman refers to it in his appellate brief. The trial court appointed counsel for Aschliman and placed a lien on his property "to reimburse Adams County for any costs of representation incurred by the defendant if he does not retain counsel privately." (App. at 82.) Aschliman argues this lien "prohibit[ed] him from selling or otherwise using the property to obtain counsel of his own choice." (Br. of Appellant at 7.) This issue was available on direct appeal but was not raised. Consequently, as the post-conviction court found, this issue is waived.

[4] In *Grimstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006), our Indiana Supreme Court noted "there are occasions when it is appropriate to resolve a post-conviction case by a straightforward assessment of whether the lawyer performed within the wide range of competent effort that *Strickland* contemplates." Because Aschliman provided no argument regarding prejudice, this is not one of the "occasions when it is appropriate to assess counsel's performance."

*Bieghler v. State*, 690 N.E.2d 188, 192-93 (Ind. 1997), *reh'g denied*, *cert. denied* 525 U.S. 1021 (1998). A defendant must also demonstrate a reasonable probability that the outcome of the direct appeal would have been different. *Thompson v. State*, 793 N.E.2d 1046, 1051-52 (Ind. Ct. App. 2003).

Aschliman asserts appellate counsel was ineffective for "failing to raise these fundamental error's [sic] on direct appeal." (Br. of Appellant at 12.) He does not, however, support this assertion with argument. Ind. Appellate Rule 46(A)(8) requires that the appellant support each contention with argument, including citations to legal authorities, statutes, and the record for support. Failure to present cogent argument constitutes waiver of an issue for appellate review. *Hollowell*, 707 N.E.2d at 1025. As Aschliman provides neither authority nor cogent argument to support this claim, this issue is waived.

**CONCLUSION**

The post-conviction court erred to the extent it took judicial notice of the record of prior proceedings. However, Aschliman has failed to demonstrate prejudice from this error. Aschliman's claims regarding assistance of trial counsel fail because he has not explained how he was prejudiced by trial counsel's alleged errors. Nor has he offered cogent argument to support his claims of ineffective assistance of appellate counsel, and therefore this error is waived.

Affirmed.

NAJAM, J., and MATHIAS, J., concur.